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FILED
MAY 25 1956
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

October Term, 1955

No. 918

MARJORIE A. MULLINS,
Petitioner,

v.

CLINCHFIELD COAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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In this brief the Upper Bond tract of land is called "Upper Bond." All italics are ours unless otherwise stated. Page references to petitioner's appendix in the Court of Appeals for the Fourth Circuit have "PA" prefixed, and to respondent's appendix in that Court have "DA" prefixed.

The purposes expressed by petitioner in the paper which she has filed in this Court are two: (1) To obtain the exercise of this Court's power of supervision over the proceedings in the courts below, under Rule 19, 1(b), to the end that said proceedings be vacated *ab initio,* upon the ground of an alleged fraudulent conspiracy against her participated in by respondent's counsel, her various counsel (except her counsel in the Court of Appeals), her expert witnesses, counsel and certain officials of the Chesapeake and Ohio

Railway Company, the District Judge, the deputy clerks of the District Court, the court reporter, the Governor of Virginia and various State officials, the Chairman of the Legal Ethics Committee of the American Bar Association, and others; petitioner's only supporting evidence consists of copies of various correspondence, *filed for the first time in this Court;* (2) To apply for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

We shall herein oppose both these objectives.

I.

OPPOSITION TO PETITIONER'S APPLICATION FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION OF THE PROCEEDINGS BELOW.

Respondent here suggests that this Court may deem it proper to strike the petition from its files upon the ground that its gravamen is a tissue of unsupported allegations impeaching the probity of certain members of the bench and bar and other individuals, which are defamatory and scandalous to an extraordinary degree. She charges that they have corruptly participated in a fraudulent conspiracy to deprive her of her property.

We make this suggestion upon the authority of *Green* v. *Elbert,* 137 U. S. 615, and subsequent analogous decisions of this Court. In the *Green* case this Court, speaking through Mr. Chief Justice Fuller, said (at p. 624):

> "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit

to be submitted to the court. It is our duty to keep our records clean and free from scandal.

"The brief of the plaintiff in error will be stricken from the files and the writ of error dismissed, and it is so ordered." (Court's emphasis)

In *Yellow Poplar Lumber Co.* v. *Chapman*, 215 U. S. 601, the memorandum opinion states that the writ of certiorari was denied and "parts of the petition and brief of petitioner stricken from the files on account of impertinent and improper matter."

In *Royal Arcanum* v. *Green*, 237 U. S. 531, it was said (at p. 546-7):

> "Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted, and impertinent expressions as to opposing counsel that we feel that we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. * * * Following the precedent set in Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Cox* v. *Wood*, 247 U. S. 3, this Court found that the brief in question contained "impertinent and scandalous passages," but concluded to permit the brief to remain, in the hope that

"... if, as a result of permitting the [illegible] on the files, they should come under [illegible] they would but serve to indicate to [illegible] of statement an absence of self-restraint or [illegible] ness of decorum will lead, and would [illegible] ish of the duty to be solicitous to obey the [illegible] limitations which an intelligent [illegible] (at p. 6-7).

In *Washington Post Co. v. Chapman*, [illegible] Court returned to the procedure of striking the [illegible] paper from the files. It was said (at p. [illegible]):

> "A writing entitled 'Answer to Petition for Writ of Certiorari and Discussion of Matters of Fact in Brief for Petitioner' signed 'John Armstrong Chapman, Sr.' and filed here April 21, 1939, contains [illegible] vant and scandalous matter and [illegible] It must be stricken from them."

We deem it a fair summary to say that [illegible] opinions in the above cited decisions indicate that the degree to which this Court there ordered stricken from [illegible] approached the degree of far-reaching [illegible] tion and scandal which the present petition contains. In addition to the charges made in the body of the petition, petitioner has made this paper the vehicle of a publication of libelous matter by appending copies of letters written by her to various persons, including the President of the United States and the President of the American Bar Association, communicating the defamations.

It appears to us that the petition is subject to rejection *in toto* by this Court on the above suggested grounds because *the defamatory allegations* constitute the [illegible] upon *which she relies in this Court.* She concedes in the petition that under the rules of conventional procedure she cannot

[illegible] principal claims [illegible] from the District Court's [illegible] findings [illegible] have become [illegible] (Petition, p. 14):

> [illegible] due to having *selecti-* [illegible] *zealous* [illegible] *willing to lay* [illegible] *Transmission Lines* and forced to [illegible] attorneys, working at a [illegible] the major aspect of it [illegible] legal injuries was not [illegible] below, and therefore [illegible] Supreme Court [illegible] this petitioner can ascer- [illegible] and the relief that [illegible] (Petitioner's emphasis)

[illegible] own admission, she cannot [illegible] invoking the exercise [illegible] discretion. Since it is only [illegible] defamatory allegations [illegible] follow that the [illegible] from the title.

[illegible] defamatory charges are [illegible]

[illegible] Bond which is a [illegible] in Wise County, Virginia. [illegible] the validity of the title. Respondent has [illegible] upon the valuable surface improve- [illegible] a mine located upon ad- [illegible]

[illegible] committed a sum ap- [illegible] constructing the improvements [illegible] petitioner wrote respond- [illegible] full value of

Upper Bond, and called upon respondent "to remove therefrom any and all constructions, sidings and machinery and materials within thirty days" (PA XIX). Respondent declined to comply. Thereafter petitioner instituted this action in the District Court of the United States for the Western District of Virginia, seeking a mandatory injunction and large damages against respondent and Chesapeake & Ohio Railway Company, jointly.

The District Court after a lengthy trial found against her on all her main claims, but gave judgment in her favor for $1,363.50 representing the value of a small quantity of outcrop coal which respondent displaced in excavating the foundations of its improvements. Petitioner appealed from this judgment, but *upon the single ground* that the District Court had not applied the proper measure of damages for the displaced coal, contending that instead of awarding her the royalty value (*i.e.* the value *in situ*), the court should have awarded her the value which the displaced coal would have had if it had been prepared for market. Petitioner did not appeal from any of the District Court's adverse findings of fact and of law relative to her claim for a mandatory injunction and her other damage claims. Consequently those findings became the law of the case. The Court of Appeals so determined, saying (petition p. 45-6):

> "On this appeal plaintiff is not pressing for a mandatory injunction, and has raised only the question of the measure of damages applicable to the coal which was displaced by defendant. The Chesapeake & Ohio Railway Company was originally joined as a party defendant in the suit, but the court dismissed the case against it, and plaintiff has not appealed from that ruling."

Petitioner does not charge that the attorneys who prosecuted her appeal from the District Court to the Court of

Appeals (one of whom was her husband's nephew—petition p. 146) were "implicated" in the alleged conspiracy against her. They alone escaped.

Among the findings of the District Court from which petitioner did not appeal are the following (PA XXII-XXIV):

> "8. I find that from and after February 16, 1948, plaintiff at no time had a bona fide present intention to mine the Upper Bond coal. I find that from and after that date her intention and efforts were to force Clinchfield to settle plaintiff's claim at a sum in excess of the value of her interest in Upper Bond.
>
> "9. I find that Clinchfield's improvements, operations and actions have not unreasonably restricted or prevented plaintiff from exercising her property rights on Upper Bond. I find that if and when plaintiff has a bona fide present intention to mine the Upper Bond coal, she is not unreasonably hindered or interfered with by Clinchfield. * * *
>
> "10. I find that mining conditions on Upper Bond are difficult and would render mining the coal relatively expensive; that the amount of the minable coal reserves is at best limited; and that the surface installations which plaintiff would reasonably require in mining would be of a simple and inexpensive type such as is used by truck mines. * * *
>
> "Concluding my findings of fact, I feel constrained to say that this is a remarkable suit. Plaintiff acquired the mineral rights which are the basis of her suit in November 1944 for $3,250.00. Defendant acquired the residue of the title to the tract here in controversy in May 1945 for $2,500.00, a total of $5,750.00. The grantor to both was a native of that vicinity and had offered to sell the entire tract, minerals and all, in 1942 (1944), for $5,000.00. * * * No uranium, gold, oil, or gas, has been discovered on this property, nor even sus-

pected. Yet, on the basis of her $3,250.00 investment, plaintiff has sought in this suit to recover $500,000.00 damages. At as late a date as the filing of her final brief, in the event that the injunction which she seeks should not be awarded her, plaintiff, by counsel, seriously contended that she should be awarded $139,470.75 in compensatory damages, plus $150,000.00 in punitive damages, an aggregate of $289,470.75.

"I am satisfied that no one could have heard the evidence in this case, and I do not believe that anyone can read the transcript of the evidence, without coming to the conclusion that this is *not* (Court's emphasis) the case of a weak and relatively defenseless woman seeking redress for the oppressive and unconscionable actions of a large and soulless corporation. The real situation is quite the converse. It is quite obvious from many, many circumstances disclosed by the evidence that, almost from the beginning, plaintiff has been unremitting in her efforts not to mine her coal, but to extort a fabulous sum of money from the defendant, astronomically greater than the value of any rights which she possessed. * * *

"Being of the opinion that the plaintiff has not acted in good faith, that she has never had any bona fide present intention of mining her Upper Bond coal, and that, even if she did, she would not be entitled to the relief which she has sought, I therefore, upon the facts found, set out the following conclusions of law."

We do not deem it necessary to cite to the Court all the defamatory statements contained in the petition and appendix. However, we think that we should cite a number of them.

Referring to Thos. B. Gay, Esq., and his firm, Messrs. Hunton, Williams, Gay, Moore and Powell, of Richmond, Virginia (well known to this Court), who were counsel for petitioner in the District Court, and to William A. Stuart, of Abingdon, Virginia, of counsel for respondent, who is the writer of this brief, petitioner states:

"This Petitioner has been the unsuspecting victim of a fraudulent attempt *by her own attorneys* to coerce her, through the *intentional* loss of her law suit, into selling to the *Clinchfield Coal Corporation* her valuable surface easements" * * * (Petitioner's emphasis) (petition, p. 3)

"Only after persistent and concentrated strenuous efforts to purchase these valuable rights for a pittance had failed, was her fourth law firm *permitted* to instigate an action, *supposedly* in her behalf. An action, purposely designed and master-minded by counsel for the defendants, looking toward the eventual loss of the case in Court. * * * (Petitioner's emphasis) (petition, p. 4)

"* * * Those attorneys (*i.e.* Mr. Gay and his firm) should be stripped of their right to practice law." (petition, p. 17)

"These dishonorable attorneys (*i.e.* Mr. Gay and his firm) led their client to believe that she was in good hands. * * * By keeping her in the dark and letting her go to court with no engineering data to support her complaints, with no defense planned for her, and deliberately causing her to lose her case, these attorneys could continue their joint plot to coerce her into selling her rights to Clinchfield. (petition, p. 40)

"* * * For a group of unscrupulous attorneys to make a mockery of our judicial system, by conducting a 'mock trial' using a United States Court room as a *tool* to deliberately provoke a miscarriage of justice is a disgrace to this country.

"* * * She feels that this perfectly planned, skillfully executed plot, combining the efforts of counsel *for and against the Plaintiff*, was designed to deliberately cause a Miscarriage of Justice which ultimately would work to Defendant Clinchfield's benefit." (Petitioner's emphasis) (petition, p. 40-41)

"I have discovered all too late that Mr. Thomas B. Gay, Esquire, of the firm of Hunton, Williams, Gay, Moore & Powell of Richmond and the engineers that he selected to assist him were under the direct influence of the Clinchfield Coal Corporation and possibly the Chesapeake and Ohio Railway Company. I am confident that Mr. William A. Stuart, Esquire, *designed* and *engineered* the suit filed in my behalf by Mr. Gay." * * * (Petitioner's emphasis) (petition, p. 109)

"* * * No Judge should allow any Court in these United States to be used as a tool in order to promote private intentions and activities of a group of attorneys, willing to disregard all rules of their profession. The highest profession in the land next to Medicine. William A. Stuart, Judge Lively, Mr. Gay, Mr. Buford and Mr. Robertson and undoubtedly counsel for C. & O. are wholly to blame for making your Court the stage for their illegal and unprofessional endeavors and you (*i.e.* the District Judge) for not putting a stop to it." (petition, p. 113)

"Mr. Stuart, with Mr. Gay's co-operation, tried to trick me into selling and since Mr. Gay urged me after trial to sell, he is guilty of fraud, of trickery and everyone else who participated in any respect, is guilty of the same thing. I expect to openly charge every one of them from the least on up to the very top, before I'm through.

"I am petitioning the Appeal Court to rehear my case, by Dec. 18th. * * * I too, am going to make known to them what Mr. Gay & Mr. Stuart have tried to perpetrate and are guilty of * * *" (petition, p. 116)

"On December 19th, I filed one copy of a petition for a rehearing, in behalf of myself. Upon reflexion and in consideration of the facts disclosed therein regarding Mr. Thomas B. Gay, Esquire, and his effort focused upon *losing my suit* against the Clinchfield Coal Corporation and The Chesapeake & Ohio Railway Company, it appears fruitless to file the twenty-five copies and try to reargue a case purposely misrepresented to

the trial court, by Mr. Gay." (Petitioner's emphasis) (petition, p. 117)

(Letter to the President of the United States) "I am writing to ask you whether you would take a personal interest in an average American Citizen who has for ten years been the victim of law firms who are willing to sacrifice my rights in coal property that I own in Virginia rather than help me to receive justice in court for the acts of two large financially powerful corporations. * * *

"* * * I am utterly powerless to stop them because they have now bought off three law firms prior to trial (*i.e.* J. M. McLemore, Esq., of Wise, Virginia, with whom she had litigation over his fee—Ex. 200, pp. 77, 118—H. C. Bolling, Esq., Norton, Virginia, who recommended to her a compromise settlement and against whom, single-handed, she prosecuted disbarment proceedings to a hearing before the District Committee—Ex. 200, pp. 66, 70, 72-3, 100-1, 129-30, 144; Messrs. Steptoe & Johnson of Clarksburg, West Virginia—T. 188, Ex. 200, p. 12) and one firm and one Judge making a total of four. They buy off my mining engineers.

"The last firm Hunton, Williams, Anderson, Gay & Moore, Richmond, Va. (Mr. Thomas B. Gay, Esquire) * * * Mr. Gay misrepresented the case to the Court and mishandled the facts of the case. * * *

"I will appreciate any assistance in any direction. Mr. Gay should be disbarred. Thank you very much." (petition, pp. 118-19, 121)

"Clinchfield jockeyed for a position it could defend but only with lots of co-operation by my engineers and my attorneys. I say my engineers and my attorneys but that is the understatement of the year.

"But then there will be many people truly embarrassed before my situation, my deplorable situation is resolved and my very valuable rights protected." (petition, p. 140)

"I take decided offense to the tone of your letter to me of March 6th, in answer to mine requesting some special attention be afforded me by the Board of Governors in my effort as a citizen to expose one of the most humiliating and disgraceful and costly, fraudulent attempts to coerce me, by the sacrifice of my law suit, * * * by my own law firm Hunton, Williams, Gay, Moore & Powell, of Richmond, Virginia. * * * Mr. Gay's misrepresentation of my case to the Court and mishandling of my deplorable situation factually was voluntary on his part and that of the other members of this strong firm (supposedly). Believe me, when I say to you, that it was almost worth the sacrifice of my case, to catch red handed not only the members of this firm but other supposedly high class firms and a Judge of a United States District Court on malfeasance, and other officials, in various departments of our Government.

"When the person seeking assistance is told by the Chairman of the Legal Ethics Committee, as I was told to do by Mr. Drinker on March 9th, to 'go home' and to 'forget these rights' and find a hobby or 'plant lilies, or something' and advised (without examining my deed in light of Clinchfield's deed and C. & O.'s violations) *that I had no rights*, I am wondering whether 'This Association is (really) interested in the improvement of law' * * * I read through Mr. Drinker's efforts and realized Mr. Gay's real worry was of Dr. Mullins' nephew bringing my case before the American Bar, because he happens to be one of the few fine Virginia attorneys your letter speaks of. * * * If I had not been a lady and if I had not become so emotionally upset from Mr. Drinker's contemptuous and sneering and decidedly cruel attitude toward me, for having only one desire or to save my property rights, that I would have told Mr. Drinker that I would certainly like to 'plant a lily on a few attorneys I know.'" (Petitioner's emphasis) (petition, pp. 145-6)

"He (*i.e.* Mr. Gay) accepted employment on that

basis, and then a month or so later gave it up. I am satisfied that Mr. Stuart (Clinchfield) and Governor Stanley requested Mr. Gay to withdraw, as all my attorneys are asked to do. But I think right then, Clinchfield and the State of Virginia decided upon another type of strategy, or to conduct a 'mock trial' and 'whip me in Court' in an all out effort to *coerce* me into selling these valuable rights. * * *" (Petitioner's emphasis) (petition, pp. 147-8)

"* * * I had three firms bought off prior to Mr. Gay * * *" (petition, p. 149)

"No. Three is that you advance to the Board of Governors my plea for legal assistance to bring this matter of Hunton, Williams, Gay, Moore & Powell's and Stathers and Cantrall's Clarksburg, West Virginia (this firm's offense was writing her their careful opinion letter of March 10, 1955—petition p. 84—advising against appeal) and now Shewmake, Gary, Goddin and Blackwell's (who wrote her an opinion letter with which she disagreed—petition, p. 128) employment to the Legal Ethics Committee * * *" (petition, p. 150)

Of Judge Barksdale, Judge of the District Court of the United States for the Western District of Virginia, petitioner states:

"This Petitioner advised Judge Barksdale of her counsel's misrepresentation of her case by letters dated April 28, 1955 and December 10 and 11th, 1955, before she reluctantly began to realize that he was implicated and probably was guilty of malfeasance. Judge Barksdale refused to exercise any extraordinary powers and bring her situation to light." * * * (petition, p. 20)

"No Judge should allow his court room to be used as a tool by a group of unscrupulous attorneys in order to accomplish a mis-carriage of Justice. Judge Barksdale

is not fit to be a Judge in any Court much less a Federal Court.

"Is there anyway that I could have this decision set aside and be granted a new trial under honest counsel and an impartial judge? My husband and I are good Americans and we do not deserve this treatment from the legal professions, it is a disgrace to the land. I feel as though I were trying to save my property and get justice in *Russia.* * * *" (Petitioner's emphasis) (petition, p. 121)

"Believe me, when I say to you, that it was almost worth the sacrifice of my case, to catch red handed not only the members of this firm but other supposedly high ciass firms and a Judge of a United States District Court on malfeasance, and other officials, in various departments of our Government." (petition, p. 146)

"No. Two is that Dr. Mullins and I request that the American Bar Association ask for an investigation by the Senate Judiciary Sub-committee into the workings of this case through the United States District Court at Abingdon. The irregularities of the officials of that court for the Fourth Western District, in addition to malfeasance by Judge Alfred D. Barksdale." (petition, p. 150)

"What Judge would write an *absolutely false* set of Findings of Fact?" (Petitioner's emphasis) (petition, p. 152)

Of the court officials, petitioner makes several defamatory statements, one of which is the following:

"I have reason to believe that there are two sets of official documents filed with the Deputy Clerk and that the Court Reporter is under Clinchfield's direction. I have concrete proof of this and also ficticious documents are filed by the railroad with the Interstate Commerce Commission and there may also be two sets filed

there. One true set and one for Mrs. Mullins when I write the Clerk or Department heads." (petition, p. 152)

Of Governor Stanley and other Virginia State officials petitioner makes statements which are offensive and derogatory, if not defamatory (petition, pp. 11, 14, 17, 150).

Petitioner administers a severe verbal castigation to Mr. Drinker, and presents the "sincere request" that he be discharged from his position as Chairman of the Legal Ethics Committee of the American Bar Association (petition, pp. 146-7, 150-1).

It is a striking exposition of petitioner's frame of mind that she makes these extraordinary accusations without a shred of supporting proof. To her, the fact that she lost her case is final proof that the conspiracy must have existed. She offers no other evidence thereof. She is unable or unwilling to understand the legal principles involved. She believes that she has "valuable surface rights of easement" (petition, pp. 4, 6, 8, 18, 28, *et sacpe*) existing independently of any mining which she might do. She does not comprehend that her rights of surface easement exist only for the purpose of the actual mining of her coal, and then only to the extent reasonably necessary for that purpose. She imagines that respondent has no right to prepare on Upper Bond its coal mined on adjoining tracts and that consequently its plant on Upper Bond would be a "starving tipple" (petition, pp. 114, 123). She refuses to accept the fact that her estate consists only of the coal together with the right to remove it while respondent owns the entire residuum.

Having these ideas, she has convinced herself that she holds a great prize in the presence on Upper Bond of the valuable improvements of respondent and of the Chesapeake

& Ohio Railway Company (to which respondent conveyed a right of way across Upper Bond), and that she is entitled to reap a great fortune by way of ransom money.

Consequently, her various counsel who have advised against the litigation, or have recommended compromise, or have recommended against an appeal, become *ipso facto* "implicated" in the conspiracy. In her mind, Mr. Gay, Mr. Cantrall and Mr. Andrews, by their carefully considered opinion letters (petition pp. 69, 74, 84, 94, 128) recommending against appeal and against fresh litigation, thereby provided clear documentary evidence of their guilt. She appends their opinions in the apparent expectation that they will impress the Court similarly.

The same state of mind dictates her reactions to the failure of the District Judge to decide in her favor and of the various officials to act in accordance with her demands.

Petitioner's attitude (with apologies to Gilbert and Sullivan's Lord Chancellor—and to this Court) might well be expressed thus:

> The unsuspecting victim I
> Of Bench and Bar in chancery,
> All deeply villainous men but one,
> And he my husband's sister's son.

Since petitioner's allegations, upon which she bases her application for the exercise of this Court's power of supervision, are unsupported by proof, and are, upon their face, irresponsible and incredible, we do not deem it necessary or even proper to offer formal proof of their falsity. However, since the charges have been placed before the Court, William A. Stuart, the writer of this brief, who has been in touch with the controversy between petitioner and respondent since the beginning, begs leave of the Court to make here, upon his personal knowledge, his categorical denial of the charges.

Petitioner charges that he "purposely designed and masterminded" (petition, p. 4) "this perfectly planned, skillfully executed plot, combining the efforts of counsel for and against the plaintiff" (petition, p. 41). This is wholly untrue. Petitioner's counsel were not "bought off," or any of them. There was no collusion by counsel, and no malfeasance of the District Judge, or any officials.

Turning now to the trial, it was full and fair. As shown by the judgment (PA VI-VIII), the Court viewed the premises, nine days were devoted to the taking of testimony, thereafter written briefs (which were elaborate) were filed, and thereafter the case was argued orally (for an entire day). As hereinbefore noted, after the judgment of the District Court was rendered, and after Mr. Gay had written her his opinion letter of January 19, 1955 (petition, p. 69), advising against appeal, petitioner employed A. M. Cantrall, Esq., of Messrs. Stathers & Cantrall, Clarksburg, West Virginia, to consider the record with a view to prosecuting an appeal in event their consideration should lead them so to recommend. Mr. Cantrall's opinion letter, advising against and declining to prosecute an appeal, includes the following (petition, p. 85-6):

> "Our undertaking here is limited to the giving of this opinion whether it would be advisable to attempt to reopen the case or to appeal. * * *
>
> "At this state of the case you are not in any position to reopen it to take further evidence. If the appellate court should find that some phase of your case had not been fully developed, as, for instance, the matter of damages, it might order a new trial for further evidence on this question alone. This same reasoning applies to any other phase which the appellate court should deem not fully developed. However, much would depend upon the appellate court's views of the matters

of law presented and of your opportunities to present your case fully to the court below. It seems to us that you did have full opportunity to be heard and that you presented all the evidence available to you on the matters involved.

"We have carefully considered this whole matter and regret that we must tell you that in our opinion an appeal would not be justified.

"In reaching this opinion we have carefully weighed many factors which we will not attempt to enumerate in the following summary statement.

"We note initially, as a factor of some weight, the history of this suit. The suit was started on July 25, 1951, and was tried from July 12 to 22, 1954. Several procedures were utilized at length, including depositions and the filing of affidavits and exhibits. All the questions raised in such procedures were briefed and argued. Before the trial the Judge viewed the premises. During the trial each party appears to have had ample opportunity to adduce evidence. The transcript of the evidence at the trial runs to 1264 pages. Some two hundred exhibits were filed during the trial, including many large maps and aerial photographs. Expert witnesses testified for both sides. Following the trial extensive briefs were filed, after which the case was argued to counsel."

Surely it is clear, in the absence of any proof to the contrary, that petitioner had a fair trial and is without grounds for the exercise of this Court's power of supervision.

Because the petitioner appears in these proceedings without counsel, we anticipate that the Court will be inclined to a liberal view of her errors of law and procedure and her failure to comply with the Court's Rules. But surely she cannot thereby be heard upon a paper which makes charges of so irresponsible and scurrilous a character. Simply she cannot excuse the deficiencies of her petition upon the

[redacted] while begging [redacted] petition"), when the [redacted] such that no attorney [redacted] In that aspect, must [redacted] any other litigant?

[redacted] unassailable in her expressions and [redacted] her petition and appendix [redacted] have led her to file here a [redacted] supporting proof, such scan- [redacted] we beg leave to sug- [redacted]

II.

[redacted] THE APPLICATION [redacted]

[redacted] should not be of opinion to strike [redacted] the following in [redacted]

[redacted] Opinions Below

[redacted] the judgment of the [redacted] Fourth Circuit [redacted] *Appellant* v. *Cinch-* [redacted] 2d 88] (Nov. 18, [redacted] the District Court of the [redacted] Western District of Virginia in the [redacted] *Plaintiff* v. *Cinchfield*

Coal Corporation and Chesapeake & Ohio Railway Company, Defendants, 128 F. S. 437 (Feb. 24, 1955). The opinion of the District Court is copied in petitioner's appendix in the Court of Appeals (PA p. I ff.). Petitioner did not appeal from the District Court's judgment dismissing the Chesapeake & Ohio Railway Company as a party defendant.

2.

The Petition Does Not Invoke the Jurisdiction of This Court by Any Sufficient Ground Under Rule 19,1(b)

Respondent is dissatisfied with petitioner's statement of the grounds on which the jurisdiction of this Court is invoked (petition, p. 2). Respondent contends that no ground under Rule 19,1(b) is stated in the petition, except the statement (petition, p. 10) that

> "The Trial Court has so far departed from the excepted and usual course of judicial proceedings and the lower Court has so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision."

As we have sought to show in our discussion of this point in the first portion of this brief, there was no departure from the accepted and usual course of judicial proceedings in the District Court.

Aside from the issue of the exercise of this Court's power of supervision, there is here presented a single question for review, as hereinafter set out. That is purely a question of the Virginia law of damages. The petition does not disclose:

> (i) A conflict in decisions of the Courts of Appeal on the question presented, nor

(ii) That the District Court has decided the question in a way in conflict with applicable Virginia law, nor

(iii) That any question of federal law is involved or was decided by the District Court.

The precise question here presented for review involves a mineral owner's claim for damage against the surface owner who displaced some outcrop coal in grading for the construction of surface improvements. It is true, as quoted in the petition (p. 21) from the opinion of the Court of Appeals (petition, p. 46), that this precise point has not been previously decided by any court. So far as appears from the reports, no litigant ever advanced such a claim before and petitioner originated the idea. However, this is clearly a question of Virginia law in the present case, and it should follow that there is no ground under Rule 19.1(b) for the intervention of this Court.

Petitioner, in her discussion (petition, pp. 21-2) seeks to apply to a wholly different question the comment of the Court of Appeals that no previous decision existed. She refers the comment to her injunctive claim. But that claim was not before the Court of Appeals, as that court stated in its opinion (petition, pp. 45-6), and the Court's comment quoted by petitioner referred to the totally different question which we mentioned above.

3.

The Questions Presented for Review

Respondent is dissatisfied with petitioner's statement of the questions presented for review (petition, pp. 2-3).

Petitioner states three questions. Respondent contends that the only question which is before this Court is that

which petitioner seeks to state in her question numbered 3. Respondent here re-states it as follows:

> Will this Court accept the finding of the courts below that respondent's acts in excavating sites for its tipple and slack bin and in grading a side-cut for its tram tracks on Upper Bond, whereby some of the outcrop coal mixed with a larger proportion of earth and rock was displaced, did not constitute a willful trespass, when petitioner owned the coal *in situ* and respondent owned the residuum of the title, and respondent had no intention to injure petitioner and believed bona fide that it was acting within its rights, whereby the proper measure of damages for the displaced coal was its royalty value?

Questions numbered 1 and 2, as stated by petitioner, appear to submit a claim for a mandatory injunction requiring respondent to remove its improvements from Upper Bond, or at any rate a claim for damages for petitioner's occupation of a portion of said tract. These questions were not presented to the court below by petitioner's appeal from the judgment of the District Court, and were therefore not considered on the appeal. Petitioner, on the appeal, complained only that the District Court erred in finding that respondent was not a willful trespasser in displacing the outcrop coal in its excavations for its improvements, whereby the Court allowed her only the royalty value of the outcrop coal displaced. Petitioner contended that respondent was a willful trespasser and should therefore have been charged the value which said coal would have had if prepared for market.

Consequently, the Court of Appeals passed upon the single question submitted, and no other. The court said (petition, p. 45:

"On this appeal plaintiff is not pressing for a mandatory injunction, and has raised only the question of the measure of damages applicable to the coal which was displaced by defendant. . . ."

Petitioner, in her brief in the Court below, stated only one question for decision as follows (petitioner's brief in Court of Appeals, p. 4):

"QUESTION PRESENTED

Where there has been a severance of the minerals from the ownership of the surface of land and the surface owner makes extensive excavations for the sole benefit of its adjoining land during the course of which large quantities of coal belonging to the mineral owner are dug up and destroyed, does such removal and destruction of the mineral owner's coal constitute a willful trespass by the surface owner and therefore entitle the mineral owner to damages measured by the market value of the coal at the time of its conversion without deduction for costs of extraction, and not its royalty value as would be the case if the trespass were inadvertent or the result of mistake?"

The question of the measure of damages for the coal displaced was therefore the only question passed upon by the court below, and is thus the only one presented here for review. The questions sought to be raised by petitioner's questions numbered 1 and 2 were resolved against her in the District Court and she did not appeal therefrom. She concedes in the petition that she cannot raise them here (though none the less apparently seeking to do so), saying (petition, p. 14):

"It is regretfully announced that due to having *selected* two unscrupulous law firms *who were willing to lay aside the Canons of Professional Ethics* and

forced to resort to two less experienced attorneys, working at a disadvantage in this action, that the major aspect of it or the Mandatory Injunction for legal injuries was not carried upon Appeal to the Court below, and therefore cannot be reopened on an Appeal to The Supreme Court of The United States, as far as this petitioner can ascertain. So the very essence of her case and the relief that she was seeking is lost . . ." (petitioner's emphasis).

4.

Statement of the Case

(a)

Petitioner's Cause of Action

The following facts found by the District Judge were not appealed from in petitioner's appeal to the Court of Appeals.

Upper Bond contains 96.5 acres. On November 22, 1944, petitioner acquired title to the mineral and mining rights thereof for $3,250.00 (PA XVIII-XIX). A few days previously Bond had offered petitioner the entire fee simple estate for $5,000.00 (DA p. 49). Respondent acquired the residuum of the title on May 3, 1945, for $2,500.00 (PA XIX).

Upper Bond is in a disturbed area. Two seams, the Eagle and the Clintwood, outcrop on the hillside, Eagle being unmineable, and Clintwood being so split by thick partings (i.e. strata of dead material) as to make successful mining problematical (PA XIX), so that mining conditions would be difficult and mining operations would be relatively expensive (PA XXI). A lessee of petitioner's predecessor in title surrendered his lease after a brief experience in mining there (PA XXII).

Respondent, in the Summer of 1947, commenced active construction of a coal preparation plant and other valuable improvements on Upper Bond to serve its Meade mine located on an adjoining tract where respondent owns the mineral. Until February 16, 1948, petitioner did not object, but on the contrary initiated a course of correspondence with respondent looking to the lease to respondent of the Upper Bond coal (PA XIX).

Up to February 16, 1948, respondent had spent or committed a sum approaching $2,000,000.00 on constructing its Upper Bond facilities and on opening Meade mine to be served by them. By the said date, the Chesapeake & Ohio Railway Company had completed a line from Jenkins, Kentucky, to respondent's preparation plant on Upper Bond (PA XX).

On February 16, 1948, petitioner broke off the lease negotiations with respondent and demanded that respondent remove from Upper Bond "all its constructions, sidings, machinery and materials within thirty days," saying that she planned to mine the coal herself and that her operations "would require the entire surface of Upper Bond." Respondent declined to comply but offered to cooperate with her in her proposed mining operations (PA XIX-XX).

Petitioner did not accept the offer and did no mining. She instituted suit against respondent and the Chesapeake & Ohio Railway Company jointly, alleging that the presence of the improvements made it impossible for her to mine and praying for a mandatory injunction requiring the relocation or removal of all the improvements and for $500,000.00 damages (petition, p. 45).

(b)

THE DECISION OF THE DISTRICT COURT

After viewing the premises and after a lengthy trial,

the District Court found against petitioner on all points, except that it allowed her damages in the sum of $1,363.50 (PA VI-VII). That sum represented the royalty value of the outcrop coal displaced, consisting of 2682 tons from Eagle and 2772 tons from Clintwood totaling 5454 tons at 25¢ per ton (PA XXI).

With regard to the measure of damages for the displaced coal, petitioner contended that respondent was guilty of willful trespass in displacing this coal and that the proper measure of damages was the value which it would have if prepared for market, while respondent contended that it committed no trespass and that the outcrop coal had no value as coal but was part of the surface, and that respondent was entitled to treat it as "just soil" which was just what it had done (petition, p. 51); respondent further contended that if it was held to have committed a trespass in displacing the coal, the trespass was in any event not willful since it had acted in good faith and in the reasonable belief that it was within its rights, and without design to injure petitioner, and that the proper measure of damages was therefore the royalty value of the displaced coal. The District Court found that there was a trespass but that it was not willful and accordingly awarded petitioner the royalty value of the displaced coal.

The findings from which petitioner did not appeal included the following (PA XXII):

> "13. I find that Clinchfield in displacing the five thousand four hundred fifty-four (5,454) tons, acted in good faith. It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value. The evidence does not show that this coal had any market value.

"14. I find that Clinchfield did not sell, or otherwise dispose of, the displaced coal, and did not remove it from Upper Bond."

Commenting on this finding, the District Court said (PA XXII-XXIV):

"Concluding my findings of fact, I feel constrained to say that this is a remarkable suit. Plaintiff acquired the mineral rights which are the basis of her suit in November, 1944, for $3,250.00. Defendant acquired the residue of the title to the tract here in controversy in May 1945 for $2,500.00, a total of $5,750.00. The grantor to both was a native of that vicinity and had offered to sell the entire tract, minerals and all, in 1942 (1944) for $5,000.00. Shortly prior to that, he had leased the coal for $25.00 and royalties of, first, fifteen cents and then, twenty cents per ton. After lessee had conducted a small mining operation for less than a year, he surrendered his lease and got back his $25.00. No uranium, gold, oil, or gas, has been discovered on this property, nor even suspected. Yet, on the basis of her $3,250.00 investment, plaintiff has sought in this suit to recover $500,000.00 damages. At as late a date as the filing of her final brief, in the event that the injunction which she seeks should not be awarded her, plaintiff, by counsel, seriously contended that she should be awarded $139,470.75 in compensatory damages, plus $150,000.00 in punitive damages, an aggregate of $289,470.75."

On all of petitioner's claims, except the claim for damages for the displaced coal, the District Court found against her. From those other findings she did not appeal. Respondent did not appeal from the judgment against it for the displaced coal.

The findings of fact from which petitioner did not appeal included also:

> "Petitioner has at no time since February 16, 1948, had a bona fide present intention to mine. Since then her intention and efforts have been to force respondent to settle her claims at a sum in excess of the value of her estate in Upper Bond" (PA XX-XXI).

The Court of Appeals confirmed all the above-stated findings of fact of the District Court ("We adopt these findings"—petition, p. 45—"These findings are supported by substantial evidence and should not be disturbed"— petition, p. 45—"We agree with this finding"—petition, p. 50).

(c)

THE FACTS RELATIVE TO THE DISPLACEMENT OF THE COAL

(i)

The Manner in Which the Material Was Displaced Was in the Course of the Usual and Ordinary Type of Excavation for the Construction of Surface Improvements.

All of the testimony as to the manner in which the material was displaced, and as to respondent's motives and intentions in doing so was uncontradicted. In making the sidecut for the tram track grade, respondent followed the usual and standard construction procedure. It employed a bulldozer exclusively and displaced earth, stone and outcrop coal together. There was no separate removal of the carbonaceous material.

> "It was the usual type of construction work done in making your level area along the side of the hill with your bulldozer. The bulldozer blade is set on an angle with the blade faced into the hill and plowing the dirt from the face of the hill and shoving it over the side and making a horizontal bench." (DA 24-5)

> "It was standard construction and leveling the surface such as making roadways and highways or railroads, standard construction procedure." (DA 39)

Respondent made no special disposition of this outcrop coal. All of it that was displaced still remains in the general mixture of earth, stone and carbonaceous material that was displaced —

> "The Company took none of the coal * * * didn't take it elsewhere and dispose of it * * * pushed it over the side of the slope with a bulldozer." (DA 24)
>
> "It (the outcrop coal) was handled as all the other dirt and rock material were handled." (DA 36)

The District Court below said:

> "It would be another matter if they had salvaged it and sold it, but obviously they treated it as soil because all they did was push it over the bank and *use it as the soil which was pushed over also.*" (PA II)

Respondent displaced the material on the adjoining land where it owned the coal in exactly the same manner as on the land where petitioner owned it (DA 41).

The tram tracks were already in place when respondent constructed the slack bin and ditch, so that the displaced material in that instance could not be pushed by bulldozer across the tram track level and over the bank. This material "was loaded along with the overburden and dirt . . . and hauled down into the tipple bottom and dumped" (DA 37). All the material displaced in leveling the tipple site was treated just as in the case of the tram track grade—"it was pushed over the bank and became a fill" (transcript, 1116).

(ii)

Essentially, the Displaced Carbonaceous Material Was Merely Soil

It is unquestionable that in every instance respondent treated all the displaced material simply as "soil" (PA II), and essentially, soil is all it was.

Hughes, respondent's president, stated:

> "It was definitely outcrop coal. It actually was not what I would call coal, it was black, compact material, and perhaps had a small amount of fuel value, but it definitely was not salable." (DA 40)

Tieche stated:

> "In all of our opinions, in constructing that bin and the tramroad, that material was just outcrop coal. Starting from the outside of the crop line it was just stained dirt, and as you progress in, it gradually became firmer, although we are sure none of that coal could have been shipped to any of our customers and we made no attempt to save it. * * * That coal is not marketable in the trade." (DA 34)

Outcrop coal is worthless. It is regarded in the coal mining industry as "just soil" (DA 22).

Hughes said:

> "* * * usually the first underground mining of coal is thrown away. We do not want it * * * because it is soft and stained and low in heat value * * * Our customers would not accept it and we would not want our name applied to that kind of product. It would ruin our reputation." (DA 41)

He said that in opening a new mine, they had to mine

through outcrop coal for 70 to 80 feet before reaching coal of commercial value (DA 40-1).

(iii)

Respondent, in Displacing the Material, Acted Without Malice, Did Not Intend to Injure Petitioner, and Believed in Good Faith That It Was Acting Within Its Legal Rights.

With regard to respondent's motives and intentions in grading the sites for its surface improvements on Upper Bond, respondent's good faith is established without contradiction in the record. It had no purpose to deprive petitioner of any of her property or rights or to injure her in any way.

It believed in good faith that in grading the sites for its surface improvements, it was exercising rights which belonged to it as the owner of the surface. The court so found as a fact:

> "* * * I think that the defendant acted in good faith in its assumption that the coal it removed had no value. As I say, I am very doubtful whether it did have commercial value, but at any rate, I am satisfied that the defendant was not guilty of any bad faith or wilful misconduct in destroying that coal. It would be another matter if they had salvaged it and sold it, but obviously they treated it as soil because all they did was push it over the bank and use it as the soil which was pushed over also." (PA II)
>
> "I find that Clinchfield in displacing the five thousand four hundred fifty-four (5,454) tons, acted in good faith. It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value. The evidence does

not show that this coal had any market value. [illegible] XXII, finding No. 13).

Respondent's belief was reasonable. It is a matter of common knowledge that people live in coal bearing areas and carry on there the usual activities of living. Residences are erected, highways and railways are created and constructed. Doubtless the members of this Court in traveling through coal bearing areas have often seen outcropping coal seams in the banks of highway and railway cuts. The coal mining area of Southwest Virginia is a land of high rugged hills and deep narrow valleys. There is no way to construct buildings, highways, railroads, and other improvements requiring a level footing except to excavate coal. These activities cannot be carried on without disturbing the outcrop coal at the points on the hillsides where coal seams outcrop. That it is generally believed that such disturbance does not infringe the rights of mineral owners is strongly attested by the fact that so far as we have been able to find there is no recorded case of such a claim as the one here involved—certainly not in Virginia.

It is against this background of common usage that the good faith of respondent's action is to be judged.

That respondent bona fide believed that it had the right to displace the material in question is convincingly shown by the testimony. Respondent believed in good faith that the superficial material *belonged to it, as the owner of the surface property subject only to petitioner's ownership of the coal.* Displacement of coal near the surface in construction of surface improvements happens "many times in coal bearing areas * * * in the construction of a house * * * in the excavation of a building * * * in digging roads * * * in a proper use of their surface rights." D.3 —.

[illegible] intention to trespass upon [illegible] displacing that material [illegible]

[illegible] surface in establishing [illegible] (DA-39). "We felt that in [illegible] surface [illegible] we wanted to erect a [illegible] required that the foundations [illegible] material which would [illegible] within our rights to go [illegible] the foundations." (DA [illegible] foregoing to remove or displace [illegible] (DA-40).

[illegible] good faith of respondent's [illegible] involved was [illegible] mentioned that [illegible] across the interest [illegible] used the owner of [illegible] material exactly as it treated it [illegible]

[illegible] *Displaced Carbonaceous Material by Mining It*

[illegible] displacing the carbonaceous material [illegible] which incurred to it any [illegible] necessarily could not be considered [illegible] carbonaceous material [illegible] and the court [illegible]

[illegible] whether that coal had any real [illegible] and it did belong to the

> plaintiff. * * * At the same time I think that the defendant acted in good faith in its assumption that the coal it removed had no value. As I say, I am very doubtful whether it did have commercial value. * * *" PA II)

that value, instead of being added to by the actions of the respondent, was wholly dissipated thereby. The court found, with reference to the value of this so-called coal *after its displacement*:

> "The evidence does not show that this coal had any market value." (PA XXII, finding No. 13)

The conclusion is inescapable that, as to all the displaced material, respondent's actions imparted no additional value to the carbonaceous component, but rather the contrary. It is obvious that a mixture of earth and rock with a small proportion of low class carbonaceous material would not be salable as coal.

5.

The Argument

Petitioner challenges the District Court's finding of fact that respondent believed in good faith that it was within its rights in making the excavations. She challenges the District Court's conclusion of law (PA XXIV) that respondent was not guilty of willful trespass so that the proper measure of damages was the royalty value of the coal.

(a)

Respondent's Trespass Was Not Willful

Without arguing the facts under this heading, which

we believe are sufficiently set out in the statement of the facts hereinbefore contained, we submit that the District Court's finding that respondent acted in good faith is adequately supported by the evidence.

The applicable decisions of the Supreme Court of Appeals of Virginia appear to us to settle the question of law in respondent's favor. We refer the Court to the following authorities:

The leading Virginia case is *Wood* v. *Weaver*, 121 Va. 250, 92 S. E. 1001. The plaintiffs had sued defendant in conversion for cutting and removing certain trees which defendant claimed it owned but which were in fact owned by plaintiffs. The jury had rendered a verdict for plaintiffs for the market value of the trees *after their manufacture into lumber*. The trial court placed plaintiffs on terms to accept the stumpage value of the trees. The Virginia court affirmed, holding that the jury had proceeded under an erroneous instruction that they should award plaintiffs the market value of the manufactured lumber (thus including the value added to the trees by defendant's labor) *even though defendant had cut and removed the trees in the bona fide belief that they were his property*. The Court said (121 Va. 255-6):

> "But there was other evidence aforesaid from which *the jury might have found the fact to be that he did the cutting under such claim of title and that the latter was bona fide; * * *"*
>
> "In view of said quoted instruction, this did not mean a finding by the jury that the trespass of the defendant in the cutting of the trees was a willful trespass, but the contrary, since the trial court instructed them, in effect, to find that very verdict if they believed from the evidence that the trespass was not willful, but under *bona fide* claim of title."

The Court went on to discuss the nature of a non-willful trespass (121 Va. at 261-3):

> "Mere negligence of the trespasser with respect to ascertaining the true location of property, or the title to it, will not render the trespass willful (*Powers* v. *U. S.*, 119 Fed. 562, 56 C. C. A. 128; *U. S.* v. *Eccles* (C. C.), 111 Fed. 490; *Beede* v. *Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; *Durant Min. Co.* v. *Percy etc., Co. supra*). There is some conflict in the authorities however. See *Donoven* v. *Consol. Coal Co.*, 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; *Mississippi, Etc., Co.* v. *Page, supra,* and the Texas case of *Young* v. *Pine Ridge Lumber Co.* (Tex. Civ. App.), 100 S. W. 784, and other Texas cases. This last named case goes beyond the true rule, to the extreme of holding that if the trespasser, by the exercise of reasonable care and diligence, would have known that he had no title to the timber cut he was a willful trespasser; which, in effect, holds that if he was guilty of negligence the trespass was willful. To the same effect *Messer* v. *Walton*, 42 Tex. Civ. App. 488, 92 S. W. 1037; *Ripy* v. *Less*, 55 Tex. Civ. App. 492, 118 S. W. 1084. The great weight of authority, however, is as stated * * *"
>
> "The trespass must be committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, otherwise it is willful; and, conversely, if it be in truth committed under such claim of right or title, not induced as aforesaid, it is not willful (citing numerous authorities). *This rule is not changed by the fact that the trespasser has notice at the time of the trespass that another asserts a bona fide title to the same property* * * *"
>
> "Therefore, under the well settled rule shown by the above cited authorities, the plaintiffs were entitled to recover only compensatory damages, unaugmented by

the added value due to the labor of the defendant in manufacturing the trees into lumber—that is to say, in such case the stumpage value of the trees, or $276.00 was the correct measure of the plaintiff's damages."

French v. *Stange Mining Co.*, 133 Va. 602, 114 S. E. 121, involved a controversy over the ownership of a tract of land containing manganese ore. Complainant instituted a suit for discovery and accounting, alleging that defendant had removed some of the ore and praying for discovery of the amounts received by defendant in marketing such ore. The Virginia court held that the market price received was not material, saying:

"* * * The complainants are not entitled, under the averments in the bill, to recover the purchase price of the ore as a finished product. This would be the measure of damages if the defendants had been willful trespassers, but they cannot be so regarded. The measure of damage in this case is the value of the ore in place, or what may be termed its royalty value * * *." (133 Va. at 618)

"* * * the willfulness of the defendants' conduct is negatived by the allegations of the bill. Johnson and those claiming under him were in good faith asserting title to the whole of the 177 acres, and actually prevailed in that claim as to about one-half of the land." (133 Va. at 619)

In *Pan Coal Co.* v. *Garland Pocahontas Coal Co.* (W. Va.), 125 S. E. 226, the defendant had mined, prepared and sold some of plaintiff's coal. The defense was that defendant had a reasonable and honest belief under an agreement with plaintiff's mine superintendent that he had the right to mine the coal. The court declined to instruct the jury that if defendant mined the coal in good faith, in the honest

belief that he had the right to do so, the plaintiff was entitled to recover only the value of the coal in place. On the contrary the court instructed the jury that the measure of damages was the market value of the coal after its preparation for market by the defendant. The West Virginia Court of Appeals reversed the case, saying (125 S. E. at 232):

> "Can we say, as a matter of law, that the defendant was a willful trespasser as to section No. 1? If he was, then the refusal of defendant's instruction was not error. If we cannot, then it became a question for the jury, and should have been submitted to it. That defendant intentionally mined out the section, knowing it was plaintiff's coal, there can be no doubt. *In the sense that it did it intentionally, its trespass was willful. But so is every trespass under a bona fide claim of right. However, in the law of trespass, the terms intentional and willful are not always synonymous.*" * * *
>
> "* * * In this sense, to be a willful trespasser, one must not only intentionally commit the act of trespass, *but must do so under such circumstances as would warrant the court or jury in finding that he did it in bad faith.* * * *" (125 S. E. at 232)

Is it not clear that the District Court correctly applied the appicable rule of law to the facts of this case, and that the Court of Appeals correctly affirmed?

III.

CONCLUSION

We submit that the petition should be refused.

Respectfully submitted,

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